STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY B. GEDERT, and LORRAINE M. GEDERT,

Plaintiffs-Counterdefendants-Appellants,

v

LENAWEE COUNTY ROAD COMMISSION,

Defendant-Counterplaintiff-Appellee,

and

VIOREL NIKODIN, LUMINITA NIKODIN, ELI DUDLEY, JACQUILYN L. DUDLEY, MILO T. BISHOP and ELIZABETH BISHOP,

Defendants.

UNPUBLISHED
November 25, 2003

No. 241664
Lenawee Circuit Court
LC No. 99-008301-CH

Before: Cooper, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting defendant Lenawee County Road Commission's motion for summary disposition under MCR 2.116(C)(10). We note that the order entered on May 6, 2002, from which plaintiffs claim this appeal, leaves a trespass claim pending against defendants Eli and Jacquilyn Dudley. Therefore, this is not a final order that may be appealed as of right. We elect to treat this claim as an application for leave to appeal and grant it. Further, we reverse the decision of the trial court and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs purchased Lots 33 and 34 of the Plat of Wolf Lake. The plat indicates that Lakeview Drive provides access, but this section of the Lakeview Drive public right-of-way has never been developed. The undeveloped portion of this roadway is covered by water or marsh, effectively making Lot 33, which is otherwise surrounded by lakes, an island inaccessible by land. Plaintiffs bought the property at a tax sale knowing that there was no land access. There was a public access on the lake, making the property accessible by boat. Plaintiffs removed a guardrail marking the point where the developed roadway ends and constructed a wooden

boardwalk or dock over the right-of-way. Plaintiffs were advised that they needed a permit for the boardwalk. Defendant road commission would not consent to the permit.

Plaintiffs brought this action, seeking, among other things, injunctive relief based on the assertion that they had an easement by necessity. The trial court granted defendant's motion for summary disposition, determining that plaintiffs were not entitled to an easement by necessity since the public boat access gave them reasonable access to the property.

In *Schmidt v Eger*, 94 Mich App 728, 732; 289 NW2d 851 (1980) (footnote omitted), the Court expounded on implied easements:

> An implied easement may arise in essentially two ways. First, it can be implied from necessity.[1] In this situation, an estate has been severed, leaving the dominant estate without a means of access. Before an easement will be implied in this situation, the party who would assert the easement must establish that it is strictly necessary for the enjoyment of the property. Mere convenience, or even reasonable necessity, will not be sufficient if there are alternative routes, even if these alternatives prove more difficult or more expensive. All implied easements are based on the presumed intent of the parties, but this sort is additionally supported by the public policy favoring the productive and beneficial enjoyment of property. . . .

Since any implied easement in this case was based on the dominant estate being left without a means of access at the time of severance, plaintiffs were required to establish strict necessity. The trial court spoke of access by water as reasonable access, in essence finding no strict necessity since the property could be accessed by water.

In *Rodal v Crawford*, 272 Mich 99, 117; 261 NW 260 (1935), the dissenting chief justice concluded:

> Plaintiffs are engaged in commercial fishing on the Great Lakes. The waters of Betsie bay in front of plaintiffs' premises are navigable. The business of the Woodwards and of plaintiffs is based upon the use of such waters. Plaintiffs have access by the use of such navigable waters to the public streets of the village of Frankfort. No way of necessity over defendant's land exists.

The majority responded:

> The defense that plaintiffs have an outlet by the use of the water in the bay in front of their property was not raised upon the trial, nor does it appear in the reasons for appeal. I think it should not be considered, but, if it be, it seems

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[1] The second way, not at issue here, is an easement implied from a quasi-easement. It requires that there be an obvious and apparently permanent servitude over one part of the estate and in favor of the other at severance. *Schmidt, supra* at 733.

> apparent that the decisions quoted from by the Chief Justice should not be held to apply to the use of water which, as is well known, is frozen and may not be navigated except by large vessels during a number of months in each year. [*Id.* at 105.]

As noted in Anno: Easements: Way by Necessity Where Property is Accessible by Navigable Water, 9 ALR 600, the trend among other states has been to recognize easements by necessity even when there is access by water. *Rodal* indicates that most Michigan waters would be regarded as incapable of providing access since they are frozen and nonnavigable for at least part of the year. Accordingly, the trial court's decision, holding that there was no easement by necessity because there was access by water, is reversed.

Defendant asserts that plaintiffs had access by boat or "by use of the right of way in a manner not inconsistent with its dedication and in accordance with the reasonable rules and standards of the Road Commission." However, since the road commission had indicated to plaintiffs that they could not use the right-of-way in a manner that would allow them access to their property, it is illusory to suggest that the road commission's rules and standards permitted access.

Defendant also argues that there must be privity of contract for the easement to have been transferred, and asserts that there is none since the original grantor did not grant the easement directly to plaintiffs. Defendant cites no authority for this proposition. Defendant may not leave it to this Court to search for authority to support its position. *McPeak v McPeak (On Remand)*, 233 Mich App 483, 495-496; 593 NW2d 180 (1999). It appears defendant confuses this concept with privity of estate, which Judge Holbrook indicated was required for an easement by necessity in his dissent in *White Pine Hunting Club v Schalfoski*, 65 Mich App 147, 151; 237 NW2d 223 (1975).

What structures, if any, plaintiffs may place on the property go to the scope of the easement. In *Schumacher v Dep't of Natural Resources*, 256 Mich App 103, 106; 663 NW2d 921 (2003), the Court stated:

> The scope of an easement by necessity is that which is reasonably necessary for the proper enjoyment of the property, with minimum burden on the servient estate.

This determination can only be made on remand.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Jane E. Markey
/s/ Patrick M. Meter